CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 582

ADOLPH B. SPRECKELS, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 3, 1941.

CERTIORARI GRANTED OCTOBER 20, 1941.

NO. 9687

United States

Circuit Court of Appeals

For the Ninth Circuit.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

ADOLPH B. SPRECKELS,
Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the United States Board of Tax Appeals.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Amendment to Petition	13
Answer	12
Answer to Amendment to Petition	17
Appearances	1
Assignments of Error	32
Decision	29
Designation of Portions of Record	40
Designation of Portions of Record to be Printed	39
Docket Entries	1
Findings of Fact and Opinion	19
Notice of Filing Petition for Review	35, 36
Opinion	22
Petition	4
Amendment to	13
Petition for Review	30

Page

Review:
Assignments of Error 32
Designation of Portions of Record to be Printed 39
Petition for 30
Statement of Points on 37
Statement of Points 37

Proceedings in U. S. C. C. A., Ninth Circuit 45
Clerk's note re submission, etc. 45
Judgment—Case No. 9687 45
Clerk's certificate 46
Order allowing certiorari 47

APPEARANCES:

For Petitioner:

HERBERT W. CLARK, Esq.,
LEON de FREMERY, Esq.,
WALTER SLACK, Esq.,

For Respondent:

T. M. MATHER, Esq.,
E. M. WOOLF, Esq.

Docket No. 94621

ADOLPH B. SPRECKELS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES:

1938

July 6—Petition received and filed. Taxpayer notified. (Fee paid)

July 7—Copy of petition served on General Counsel.

Aug. 9—Answer filed by General Counsel.

Aug. 9—Request for Circuit hearing in San Francisco filed by General Counsel.

Aug. 11—Notice issued placing proceeding on San Francisco Calendar. Service of answer and request thereon.

1939

Mar. 25—Hearing set May 29, 1939, San Francisco, California.

June 8—Hearing had before Mr. Disney on merits. Submitted. Called May 25, 1939. Petitioner moves to amend petition—granted. Motion to consolidate dockets 94631 and 95639 granted. Respondent allowed usual time to file amended answers. Application to file an amended petition filed—copies served. Briefs due July 25, 1939—reply due 8/15/39.

June 15—Answer to amendment to petition filed by General Counsel.

June 27—Transcript of hearing of June 8, 1939 filed.

July 22—Brief filed by General Counsel.

July 24—Brief filed by taxpayer. 7/24/39 copy served.

Aug. 10—Reply brief filed by General Counsel.

Aug. 17—Notice to send future notices to Walter Slack as counsel, filed.

Aug. 25—Motion for leave to file reply brief filed by taxpayer—reply brief lodged. 8/28/39 granted.

Aug. 29—Copy of motion and reply brief served on General Counsel.

1940

May 21—Findings of fact and opinion rendered—R. L. Disney, Division 4. Decision will be entered under Rule 50.

June 19—Computation of deficiency filed by General Counsel.

1940

June 24—Hearing set July 24, 1940 on settlement.

July 3—Computation of deficiency filed by taxpayer. 7/5/40 copy served.

July 19—Notice to send all notices to Walter Slack filed by Herbert W. Clark and Leon de Fremery.

July 24—Hearing had before Mr. Smith on settlement under Rule 50. Respondent concedes petitioner's recomputation correct —referred to Mr. Disney for decision.

July 29—Notice of the appearance of Walter Slack as counsel filed. [1*]

July 31—Transcript of hearing of July 24, 1940 filed.

Aug. 5—Decision entered—R. L. Disney, Division 4.

Oct. 22—Petition for review by U. S. Circuit Court of Appeals, Ninth Circuit, with assignments of error filed by General Counsel.

Oct. 31—Proof of service filed by General Counsel (2).

Nov. 13—Statement of points filed with proof of service thereon.

Nov. 13—Designation of portions of record to be contained in record filed by General Counsel with proof of service and agreement thereon.

Nov. 13—Agreed designation of portions of record to be printed, filed. [2]

*Page numbering appearing at foot of page of original certified Transcript of Record.

United States Board of Tax Appeals

Docket No. 94621

ADOLPH B. SPRECKELS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:E:1-JHU-90D), dated April 7, 1938, and as a basis of his proceeding alleges as follows:

1. Petitioner is an individual, with his principal office at 2 Pine Street, San Francisco, California. The return for the period here involved was filed with the Collector for the First District of California.

2. The notice of deficiency (a copy of which is attached and marked Exhibit "A") was mailed to the petitioner on April 7, 1938.

3. The taxes in controversy are income taxes for the calendar year 1935, and in the amount of $4,909.17. [3]

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) The Commissioner erred in including in petitioner's income the amount of $8,937.24, erron-

eously alleged to be taxable dividends received by petitioner from Monarch Investment Company.

(b) The Commissioner erred in increasing the petitioner's distributive share of the income received by the Trustees under the Will of Adolph B. Spreckels, deceased, by the amount of $500.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) During the calendar year 1935 the petitioner received from Monarch Investment Company, a corporation, distributions in the amount of $8,937.24, all of which distributions were made by said corporation from capital, and no part of said distributions was made by said corporation out of its earnings or profits accumulated after February 28, 1913. The Commissioner has erroneously determined that said distributions were made out of earnings accumulated after February 28, 1913.

(b) It is impossible to ascertain why the Commissioner has increased the petitioner's distributive share of the income received by the Trustees under the Will of Adolph B. Spreckels, deceased, from the amount of $11,537.05, as reported, to the amount of $12,037.05. An examination of the Revenue Agent's original report and supplemental report on said trust [4] indicates that the only change made by the Revenue Agent to the net income of said trust was to include therein the amount of $32,811.72 alleged to be taxable dividends received from Monarch Investment Company. Of said amount petitioner received as his distributive share

the sum of $1,000, which amount petitioner alleges is not taxable income for the reason that said distributions in the amount of $32,811.72 were made by said Monarch Investment Company from capital, and no part of said distributions was made by said corporation out of its earnings or profits accumulated after February 28, 1913. If the increase in the amount of $500 in petitioner's distributive share of the income of said trust represents a part of said $1,000 received by petitioner from said Trustees as aforesaid, then petitioner asserts that said sum of $500 is nontaxable to him, for the reason that it is a part of a capital distribution made by said Monarch Investment Company.

(c) On or about December 11, 1936, petitioner paid to the Collector of Internal Revenue at San Francisco, California, income taxes for the calendar year 1935 in the amount of $12,138.50.

Wherefore, petitioner prays that this board may hear the proceeding and determine that there is an overpayment of income taxes in the amount of $234 for the calendar year 1935, and that said taxes were paid by the petitioner [5] within three years before the filing of this petition.

HERBERT W. CLARK
LEON de FREMERY
Counsel for Petitioner
1110 Crocker Building
San Francisco, California [6]

State of California,
County of San Diego—ss.

Adolph B. Spreckels, being duly sworn, says:

That he is the Petitioner above named; that he has read the foregoing Petition and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information or belief, and that those he believes to be true.

ADOLPH B. SPRECKELS

Subscribed and sworn to before me this 1st day of July, 1938.

[Notarial Seal] MARK VILIM
Notary Public in and for the County of San Diego, State of California.

My Commission Expires February 26, 1939. [7]

EXHIBIT "A"

IT:E:I
JHU:90D Apr 7 1938

Mr. Adolph B. Spreckels,
2 Pine Street,
San Francisco, California.

Sir:

You are advised that the determination of your income tax liability for the taxable year(s) ended December 31, 1935 discloses a deficiency of $4,675.17 as shown in the statement attached.

In accordance with section 272(a) of the Revenue Act of 1934, notice is hereby given of the de-

ficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C1:P-7. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,
GUY T. HELVERING
Commissioner,
By (Signed) JOHN R. KIRK
Deputy Commissioner.

Enclosures:
Statement
Form 870

JHU/EC--3 [8]

STATEMENT

IT:E:1
JHU:90D

Mr. Adolph B. Spreckels,
2 Pine Street,
San Francisco, California.

Tax Liability for Taxable Year Ended
December 31, 1935
Income Tax

Year—1935.
Liability—$53,229.20.
Assessed—$48,554.03.
Deficiency—$4,675.17.

In making this determination of your tax liability, careful consideration has been given to the internal revenue agent's report dated April 19, 1937; to your protest dated June 16, 1937, and to the statements made at the conference held on August 26, 1937.

A copy of this letter and enclosures has been mailed to your representative Mr. Herbert W. Clark, in accordance with the authority contained in the power of attorney executed by you and on file with the Bureau.

Adjustments to Net Income

Net income as disclosed by return		$141,146.52
Unallowable deductions and additional income:		
(a) Interest	$ 90.00	
(b) Dividends	8,987.24	9,077.24
Total		$150,223.76
Nontaxable income and additional deductions:		
(c) Interest on taxfree covenant bonds		90.00
Net income adjusted		$150,133.76

Explanation of Adjustments

(a) and (c) Interest on bonds of the Los Angeles Gas and Electric Company which was erroneously included in interest from tax-free covenant bonds has been transferred to ordinary interest. [9]

(b) Dividends from the Monarch Investment Company in the amount of $8,937.24 which you received were not included in income. The Bureau holds that the dividends in question are 100 percent taxable, therefore the amount has been added to income. Dividends from the Reynolds Tobacco Co. reported as $2,250.00, have been reduced to $1,800.00, due to excluding $450.00 which was not payable until January 1, 1936.

Your share of adjusted income from Walter D. K. Gibson, et al., Trustees under will, Estate of Adolph B. Spreckels, Deceased (Trust) has been determined to be $12,037.05, taxable as dividends. As you included $11,537.05 as dividends from the trust in your return, the amount reported has been increased by $500.00.

In determining the correct net income of the trust, the amount reported on the fiduciary return was adjusted as follows:

Net income reported on fiduciary return, form 1041	$200,986.12
Add:	
Dividends	32,811.72
Net income adjusted	$233,797.84
Distribution of income:	
Mrs. Alma Spreckels	$194,686.69
Adolph B. Spreckels	12,037.05
Mrs. Alma Spreckels Rosekrans	12,037.05
Mrs. Dorothy S. Dupuy	12,037.05
Estate of Adolph B. Spreckels, Deceased (Trust)	3,000.00
Total	$233,797.84

Dividends from the Monarch Investment Company in the amount of $32,811.72 were received by the trust, but were not included in income for the reason that they were considered to be distributions from capital. As the Bureau holds that the dividends are 100 percent taxable, fiduciary income has been increased by $32,811.72.

Computation of Tax

Net income adjusted	$150,133.76
Less:	
Personal exemption and credit for dependents	1,791.67
Balance (surtax net income)	$148,342.09

Brought forward		$148,342.09
Less:		
Interest on Liberty Bonds	$ 10,548.62	
Dividends	134,613.29	
Earned income credit	300.00	145,461.91
Net income subject to normal tax		$ 2,880.18
Normal tax at 4% on $2,880.18		115.21
Surtax on $148,342.09		53,137.89
Total		$ 53,253.10
Less:		
Income tax paid at source		23.90
Correct income tax liability		$ 53,229.20
Income tax assessed:		
Original, account #202428, April, 1936		48,554.03
Deficiency of income tax		$ 4,675.17

[Endorsed]: U.S.B.T.A. Filed July 6, 1938. [11]

[Title of Board and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the above-named petitioner, admits and denies as follows:

1, 2 and 3. Admits the allegations contained in paragraphs 1, 2 and 3 of the petition.

4 (a) and (b). Denies that the Commissioner erred in the determination of the deficiency alleged in subparagraphs (a) and (b) of paragraph 4 of the petition.

5 (a). Admits that during the calendar year 1935 the petitioner received from the Monarch Investment Company, a corporation, distributions in the amount of $8,937.24, but denies the remaining allegations contained in said paragraph.

5 (b). Denies the allegations contained in subparagraph (b) of paragraph 5 of the petition.

5 (c). For lack of information denies the allegations contained in subparagraph (c) of paragraph 5 of the petition. [12]

6. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and that the petitioner's appeal be denied.

Signed J. P. WENCHEL, TMM
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
ALVA C. BAIRD,
T. M. MATHER,
Special Attorneys,
Bureau of Internal Revenue.

[Endorsed]: U.S.B.T.A. Filed Aug. 9, 1938. [13]

[Title of Board and Cause.]

AMENDMENT TO PETITION

Now comes the petitioner above named and leave having been first obtained, files this amendment to

his petition in the above-entitled proceeding, and alleges as follows:

I.

That the determination of tax set forth in the notice of deficiency, a copy of which is attached to the original petition, is erroneous in the following particular in addition to the errors specified in the original petition, viz:

(c) That the Commissioner erred in not allowing as a deduction in determining petitioner's income subject to income tax for the calendar year 1935 the sum of $2,363.75 representing selling commissions paid in connection with sales of stocks, bonds and commodities. [14]

II.

The facts upon which petitioner relies in support of this amendment to his petition and the supplemental assignment of error hereinabove set forth are as follows:

(d) Petitioner in making his income tax return for the calendar year 1935 showed a net income subject to Federal income tax in the sum of $141,146.52; that said amount was incorrect and excessive by reason of the failure of petitioner to take a deduction for selling commissions paid in connection with sales of stocks, bonds and commodities under the following circumstances:

(i) During the calendar year 1935 petitioner was engaged in the business of purchasing and selling stocks, bonds and commodities for profit and

during said calendar year paid selling commissions in connection with such sales amounting to $2,363.75; that said selling commissions so paid as aforesaid were not taken as a deduction in computing petitioner's income tax for said year. Under section 23 (a) of the Revenue Act of 1934 and Articles 23 (a)-1 and 24-2 of Regulations 86 said commissions are deductible in computing petitioner's net income and petitioner claims the right to deduct the same.

(ii) That after the filing of the petition in the above-entitled proceeding, and on the 9th day of March, 1939, petitioner duly filed with the Collector of Internal Revenue [15] at San Francisco, California, a claim for the refund of $1,323.70 income tax overpaid for the calendar year 1935 by reason of petitioner's failure to deduct the above mentioned commissions on sales of stocks, bonds and commodities in computing and paying his Federal income tax for said calendar year; that by reason of petitioner's right to take an additional deduction in the amount of $2,363.75 for selling commissions as aforesaid petitioner is entitled to a refund on account of his income tax for said year in the sum of $1,323.70.

Wherefore, petitioner prays that this Board may hear the proceeding and determine that there is no deficiency in income tax due from petitioner for the calendar year 1935, and that petitioner has overpaid his income tax for said year in the sum of $1,557.70, and that said taxes were paid by said peti-

tioner within three years before the filing of the original petition in this proceeding, and that $1,323.70 of said taxes were paid within three years before the filing of a refund claim therefor with the Collector of Internal Revenue for the First District of California.

HERBERT W. CLARK
LEON de FREMERY
1110 Crocker Building
San Francisco, California
WALTER SLACK
1908 Russ Building
San Francisco, California
Counsel for Petitioner [16]

State of California
City and County of San Francisco—ss.

Adolph B. Spreckels, being duly sworn, says:

That he is the petitioner above named; that he has read the foregoing Amendment to Petition and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those he believes to be true.

ADOLPH B. SPRECKELS

Subscribed and sworn to before me this 23rd day of May, 1939.

(Seal) LOUIS WIENER
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires: July 30, 1939.

[Endorsed]: U.S.B.T.A. Filed at hearing June 8, 1939. [17]

[Title of Board and Cause.]

ANSWER TO AMENDMENT TO PETITION

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the amendment to petition filed by the above-named petitioner, admits and denies as follows:

I. (c) Denies the allegations contained in subparagraph (c) of paragraph I of the amendment to petition.

II. (d) Admits that petitioner in making his income tax return for the calendar year 1935 showed a net income subject to Federal income tax in the sum of $141,146.52, but denies the remaining allegations contained in subparagraph (d) of paragraph II of the amendment to petition.

(i) Denies the allegations contained in subparagraph (i) of paragraph II of the amendment to petition.

(ii) Admits that after the filing of the petition in the above-entitled proceeding, and on the 9th day of March, 1939, petitioner duly filed with the Collector of Internal Revenue at [18] San Francisco, California, a claim for the refund of $1,323.70 income tax for the calendar year 1935 by reason of petitioner's failure to deduct commissions on sales

of stocks, but denies the remaining allegations contained in subparagraph (ii) of paragraph II of the amendment to petition.

III. Denies generally and specifically each and every allegation in the amendment to petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and that the petitioner's appeal be denied.

Signed J. P. WENCHEL TMM
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
ALVA C. BAIRD,
T. M. MATHER,
Special Attorneys,
Bureau of Internal Revenue.

TMM:emb 6-9-39.

[Endorsed]: U.S.B.T.A. Filed June 15, 1939. [19]

United States Board of Tax Appeals

Docket Nos. 94621, 95639

Promulgated May 21, 1940.

ADOLPH B. SPRECKELS,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

FINDINGS OF FACT AND OPINION

1. Petitioner was engaged in the business of purchasing and selling stocks, bonds, and commodities for profit. Held, selling commissions paid to brokers were properly deducted as business expense. Neuberger v. Commissioner, 104 Fed. (2d) 649.

2. Prior to determination of deficiency, petitioner filed a claim for refund of taxes paid, on the ground that he had not taken deduction for stamp taxes paid. In determining the deficiency, the stamp taxes were allowed as deductions, but other items resulted in determination of a deficiency. Stipulations show an overpayment of tax. At the hearing, more than three years after the last payment of tax, an amendment was filed, the effect of which was to claim, on new grounds, refund of overpayment. Held, the claim of overpayment is barred by limitations. Sec. 322 (d), Revenue Act of 1934; Commissioner v. Rieck, 104 Fed. (2d) 294,

and Commissioner v. Estate of George M. Dallas, — Fed. (2d) — (Mar. 25, 1940), followed.

Walter Slack, Esq., for the petitioner.

T. M. Mather, Esq., for the respondent.

Those proceedings, consolidated for hearing, involved originally deficiencies in income tax in the amount of $1,254.11 for the year 1934 and in the amount of $4,675.17 for the year 1935.

All of the errors raised in the original petition were disposed of by stipulation at the trial, will be reflected in computation under Rule 50, and need not further be considered herein. The issues to be examined were raised by amended petition filed in each proceeding at the hearing on June 8, 1939. Two questions are presented—first, whether a trader in securities may deduct as ordinary and necessary expense of business selling commissions paid by him, and, second, whether claim for overpayment set forth in an amended petition filed more than three years after payment of the last installment of tax is timely. The first proposition involves both taxable years; the second only 1934, in proceeding No. 95639, in which the amended petition asks for refund of overpayment of $4,087.61. [20] In proceeding No. 94621, for 1935, the amended petition asks for refund of overpayment of $1,323.70.

A part of the facts were stipulated at trial, but since the stipulation is brief it will be incorporated in the findings of fact, which we make as follows:

FINDINGS OF FACT

The petitioner, an individual who resides in San Francisco, California, filed his income tax returns for the years in question with the collector for the first district of California. During the taxable years he maintained an office, with employees keeping a complete set of books, which were kept and the income tax returns were made upon the basis of cash receipts and disbursements. Petitioner was engaged in the business of purchasing and selling stocks, bonds, and commodities for profit. He paid to brokers selling commissions in connection with such sales as follows: In 1934, $23,692; in 1935, $2,246.25. Petitioner did not deduct the selling commissions in computing income in making his income tax returns for the taxable years. Upon petitioner's books the selling commissions were deducted from the selling price, before net profit or loss was determined.

Petitioner's income tax return for 1934, filed on May 9, 1935, showed a net taxable income of $121,593.86 and a tax of $37,897.60, which was paid in installments, the last payment being made December 16, 1935, in the amount of $9,474.40. On December 23, 1937, petitioner filed a claim for refund of income tax in the amount of $4,087.61, on the ground that certain stamp taxes were paid that had not been claimed as deductions in the return. With the exception of $80, this claim was allowed in the determination of the Commissioner in the deficiency letter, which was dated July 20, 1938. Petition to the Board was filed September 26, 1938, in

proceeding No. 95639. It was stipulated that $7,828.51 may be excluded from income for 1934 as determined by the Commissioner, and that the amount of dividend credit should be reduced by $7,828.51.

Petitioner's income tax return for 1935, filed April 15, 1936, showed a net taxable income of $141,146.57 and a tax of $48,554.03, which was paid, the last installment, $12,138.50, being made December 11, 1936. Deficiency letter was dated April 7, 1938. After the filing of the petition for 1935 in proceeding No. 94621 on July 6, 1938, petitioner on March 9, 1939, filed with the collector of internal revenue at San Francisco, California, a claim for refund of income tax of $1,323.70 by reason of petitioner's failure to deduct commissions on sales of bonds, commodities, and stocks. [21]

It was stipulated that income as determined by the Commissioner for 1935 may be reduced by $9,437.24, with a reduction in the same amount in dividend credit.

Petitioner reported on his income tax return for 1934 losses of $114,249.38 from sale of stocks and commodities, and took as a deduction $2,000; also, for 1935 the losses on commodity and stock transactions were reported as $8,009.69, and loss deducted was $2,000.

OPINION

Disney: 1. Are selling commissions paid by a trader in securities deductible as business expense?

After the decision of the Circuit Court in Winmill v. Commissioner, 93 Fed. (2d) 494, we allowed selling commissions as well as purchasing commissions, in Harry H. Neuberger, 37 B. T. A. 223. On appeal to the Circuit Court our decision as to selling commissions was affirmed. Neuberger v. Commissioner, 104 Fed. (2d) 649. Certiorari was not applied for by the Commissioner. We think the dicta in Helvering v. Winmill, 305 U. S. 79, and in Helvering v. Union Pacific R. R. Co., 293 U. S. 282, referred to by respondent, are not decisive of the point here presented. We hold therefore that the respondent upon the point is in error, and that the selling commissions are allowable deductions.

The result, as to the year 1935 and in proceeding No. 94621, is that we find there is no deficiency and that there is an overpayment of tax by the petitioner in the amount of $1,323.70 paid on December 11, 1936, both within three years before the filing of claim therefor by amendment to the petition filed on June 8, 1939, and within three years before the filing of the claim for refund on March 9, 1939.

As to the year 1934, in proceeding No. 95639, a different situation is presented. The result of a stipulation entered into at the hearing is that there was an overpayment for the year 1934, but the respondent objected to the filing of the amendment to the petition, on the ground that the claim of overpayment thereby advanced was not timely, being presented for the first time on June 8, 1939, more than three years after the payment of the last

installment of tax. Respondent relies on Commissioner v. Rieck, 104 Fed. (2d) 294; certiorari denied, 308 U. S. 602, and the cases therein cited, and says that case bars consideration of the selling commissions as new grounds for claim of overpayment, because set up by amendment after the statute had run. Petitioner refers us to Georgie W. Rathborne, 39 B. T. A. 56. In the latter we followed our decision in Edward E. Rieck, 35 B. T. A. 1178, which was reversed by Commissioner v. Rieck, supra. In both cases we had entertained and allowed [22] claims for overpayment on new grounds set up in amended petitions, on the theory that such amendments related back to the filing of the original petition, and were therefore not within the bar of the statute. This theory is untenable since the decision of the Circuit Court in the Rieck case. Petitioner, however, seeks to avoid the effect of that decision by a contention that "The new error assigned in the amended petition does not give rise to this overpayment, but serves to prevent its reduction on account of other adjustments." He also argues:

> * * * petitioner is not asking for a refund of any taxes paid by reason of his failure to deduct selling commissions in preparing his 1934 income tax return, but is asking for the full allowance of a timely refund claim resulting from a failure to claim a deduction for stamp taxes paid during that year, the amount of which the respondent seeks to reduce by

> asserting other errors in the return. Petitioner claims the right to offset these other errors by the amount of selling commissions paid and thereby secure the full amount of his timely refund for the stamp taxes.

In other words, petitioner in effect contends that he is utilizing the claim as to deductible selling commissions, not as new ground for claim of overpayment, but merely to offset the offset which the Commissioner, by other items, set up against the original claim of overpayment on grounds of stamp taxes paid but not deducted. Thus, petitioner seems to argue, the original claim for refund, timely filed, is left alive and undiminished, and he now claims thereunder. Thus petitioner seeks by indirection to accomplish what can not be done directly. We think there is no essential difference between the situation here and in the Rieck case, for we think that petitioner is in fact relying upon new grounds for the overpayment. The amended petition, after reciting the facts as to the payment of selling commissions of $23,909.29 and alleging thus deductibility, concludes:

> Wherefore, petitioner prays that this Board may hear the proceeding and determine that there is no deficiency in income tax due from petitioner for the calendar year 1934, and that petitioner has overpaid his income tax for said year in the sum of $4,087.61, and that the amount of said overpayment was paid within three years before the filing of a claim for re-

> fund of said overpayment on December 23, 1937, and within three years before the filing of the original petition herein and that this petitioner is entitled to a refund of $4,087.61.

It thus appears that claim of overpayment is in fact set up anew in the amended petition, and that the only reason therefor lies in the new facts recited —the selling commissions. We think it apparent that the selling commissions are the ground of claim of overpayment. That there is new claim of overpayment is demonstrated by the fact that the claim is for $4,087.61 instead of $3,650.36, the [23] amount of overpayment claimed in the original petition. Also, it is noteworthy that the $4,087.61 overpayment claimed in the amendment is the amount of the original refund claim, filed with the Commissioner prior to determination of deficiency. Thus it appears that petitioner is now relying, not upon his original claim of overpayment of $3,650.86, but instead upon the refund claim. But that refund claim was in effect allowed by the Commissioner, for in determining the deficiency he agreed (except as to $80) that the payment of stamp taxes, pressed as ground of the refund claim, was a deductible item, and therefore gave credit, in effect, against the deficiency otherwise appearing, of the amount of the refund claim, with the small exception of $80. In Suhr v. United States, 18 Fed. (2d) 81, a very similar situation appears. There a claim for refund was, as here, filed prior to determination of defi-

ciency because of claim that nontaxable stock dividends had been reported as income. After examination of the taxpayer's books the Commissioner gave the taxpayer credit for the dividends, but found a deficiency because of other matters. The taxpayer appealed to the Board, alleging that there was no deficiency, but an overpayment. He also filed an action in the Federal court. The question was as to jurisdiction of the court. On appeal the Circuit Court said, as to the overpayment: "He was simply entitled to have the overpayment credited against his other tax liability." This seems exactly what the Commissioner did herein. We think it disposed of the original refund claim, that the petitioner here should not now be heard to rely upon that claim, and that he is in fact relying upon the new grounds as to selling commissions, barred by the statute. We find no material distinction between the situation here and that in Commissioner v. Rieck, supra. Moreover, that case has lately been approved and followed in Commissioner v. Estate of George M. Dallas, —— Fed. (2d) —— (C. C. A., 2d Cir., Mar. 25, 1940), wherein the facts were similar to those in the Rieck case. The court held that a refund of the overpayment was barred, under section 322 (d) of the Revenue Act of 1932, by the lapse of more than two years before the filing of the amended petition which first set up the grounds of overpayment.

On April 30, 1940 (41 B. T. A. ——), we reconsidered the decision entered in Denholm & McKay

Co., 39 B. T. A. 767, and, following Commissioner v. Rieck, supra, and Commissioner v. Estate of George M. Dallas, supra, held that an amended petition filed more than three years after the payment of tax does not relate back to the time of filing of original petition so as to authorize the crediting or refunding of an overpayment in tax attributable to a new issue raised in the [24] amended petition, under section 322 (d) of the Revenue Act of 1934, as amended.

It appearing, from evidence adduced since the filing of the amendment to the petition, that the last payment of tax had been made more than three years before the amendment, we conclude and hold that the petitioner's claim for refund of overpayment is barred by the statute of limitations. Sec. 322 (d), Revenue Act of 1934.

Decision will be entered under Rule 50. [25]

United States Board of Tax Appeals
Washington

Docket No. 94621.

ADOLPH B. SPRECKELS,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to hearing on July 24, 1940, on alternative computations submitted by the parties under Rule 50, at which time the respondent conceded that the recomputation filed by the petitioner is correct, it is

Ordered and Decided: That there is an overpayment in income tax for the year 1935 in the amount of $1,490.10, which amount was paid within three years before the filing of the amended petition. (Section 809 (a), Revenue Act of 1938.)

Enter:

(Seal) (Signed) R. L. DISNEY,
Member.

Entered Aug. 5, 1940. [26]

In the United States Circuit Court of Appeals
for the Ninth Circuit

B. T. A. No. 94621

GUY T. HELVERING, Commissioner of Internal Revenue,

Petitioner on Review,

v.

ADOLPH B. SPRECKELS,

Respondent on Review.

PETITION FOR REVIEW AND ASSIGNMENTS OF ERROR

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now Comes the Commissioner of Internal Revenue, by his attorneys, Samuel O. Clark, Jr., Assistant Attorney General, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and John M. Morawski, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I.

Jurisdiction

The petitioner on review is the duly appointed, qualified and acting Commissioner of Internal Revenue, hereinafter referred to as the Commissioner, holding his office by virtue of the laws of the United States.

The respondent on review, Adolph B. Spreckels

(hereinafter referred to as the taxpayer), is an individual, with his principal office at 2 Pine Street, San Francisco, California. The taxpayer filed his Federal income tax return for the calendar year 1935 with the Collector of [27] Internal Revenue for the First District of California, whose office is located at San Francisco, California, and within the judicial circuit of the United States Circuit Court of Appeals for the Ninth Circuit.

The Commissioner files this petition pursuant to the provisions of sections 1141 and 1142 of the Internal Revenue Code.

II.

Prior Proceedings

On April 7, 1938, the Commissioner determined a deficiency in income tax for the calendar year 1935 in the amount of $4,675.17, and sent to the taxpayer by registered mail a notice of said deficiency, in accordance with section 272(a) of the Revenue Act of 1934. Thereafter, and on July 6, 1938, the taxpayer filed a petition for a redetermination of said deficiency by the United States Board of Tax Appeals.

The case was tried before the Board of Tax Appeals on June 8, 1939, at San Francisco, California.

On May 21, 1940, the Board promulgated its findings of fact and opinion (41 B. T. A. 1204), and on August 5, 1940, entered its decision that there is an overpayment in income tax for the year 1935 in the amount of $1,490.10, which amount was paid within three years before the filing of the amended petition (Section 809(a), Revenue Act of 1938).

III.

Nature of Controversy

The question involved is whether a trader in securities may deduct as ordinary and necessary expenses of business selling commissions paid [28] by him, or whether they should be used as an offset against the selling price in computing gain or loss.

Taxpayer, who was engaged in the business of purchasing and selling stocks, bonds, and commodities for profit, in 1935 paid to brokers selling commissions in the sum of $2,246.25 in connection with such sales. Taxpayer did not deduct the selling commissions in computing income in making his income tax return for the year 1935. Upon taxpayer's books the selling commissions were deducted from the selling price, before net profit or loss was determined. Taxpayer reported on his income tax return for 1935 losses of $8,009.69 from sale of stocks and commodities, and took as a deduction $2,000. Such action was not disturbed by the Commissioner in his notice of deficiency. At the hearing before the Board, taxpayer by amendment to his petition raised the issue with respect to deductibility of selling commissions as a business expense.

The Board held that these selling commissions were allowable deductions as ordinary and necessary business expenses.

IV.

ASSIGNMENTS OF ERROR

The Commissioner avers that in the record and proceeding before the Board of Tax Appeals and

in the opinion and final decision rendered and entered by the Board of Tax Appeals, manifest error occurred and intervened to the prejudice of the Commissioner who now assigns the following errors and each of them, which he avers occurred in said record, proceeding, opinion and final decision so rendered and entered by the Board of Tax Appeals;

[29]

The United States Board of Tax Appeals erred:

1. In holding and deciding that there is an overpayment in income tax for the year 1935 in the amount of $1,490.10, which amount was paid within three years before the filing of the amended petition (section 809(a), Revenue Act of 1938).

2. In failing to sustain the deficiency in income tax determined by the Commissioner for the year 1935 in the amount of $4,675.17 less the proper reduction of said amount to reflect the adjustments agreed upon by the parties at the hearing before the Board of Tax Appeals.

3. In holding that commissions of $2,246.25 paid by taxpayer to brokers in 1935 upon the sale of stocks, bonds and commodities are allowable deductions as ordinary and necessary business expenses.

4. In failing to hold that commissions of $2,246.25 paid by taxpayer to brokers in 1935 upon the sale of stocks, bonds and commodities are not allowable deductions as ordinary and necessary business expenses but are an offset against the selling price in computing gain or loss.

5. In that its opinion and decision are not supported by the evidence and are contrary to law.

Wherefore, the Commissioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, that a transcript of the record be prepared in accordance with law and with the rules of said Court and transmitted [30] to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed by said Court.

(Signed) SAMUEL O. CLARK, JR.,
Assistant Attorney General.

(Signed) J. P. WENCHEL,
RLW,
Chief Counsel, Bureau of Internal Revenue.

Of Counsel:
J. M. MORAWSKI,
Special Attorney,
Bureau of Internal Revenue. [31]

United States of America.
District of Columbia—ss.

John M. Morawski, being duly sworn, says that he is a Special Attorney in the Bureau of Internal Revenue and as such is duly authorized to verify the foregoing petition for review; that he has read said petition and is familiar with the contents thereof; that said petition is true of his own knowledge except as to the matters therein alleged on informa-

tion and belief, and as to those matters he believes it to be true.

(Signed) JOHN M. MORAWSKI,
Special Attorney, Bureau of Internal Revenue.

Sworn and subscribed to before me this 17th day of October, 1940.

GEORGE W. KREIS,
Notary Public.

My commission expires Nov. 15, 1942.

[Endorsed]: U. S. B. T. A. Filed Oct. 22, 1940.

[32]

In the United States Circuit Court of Appeals
for the Ninth Circuit

[Title of Cause.]

NOTICE OF FILING PETITION FOR REVIEW

To: Adolph B. Spreckels,
2 Pine Street,
San Francisco, California.

You are hereby notified that the Commissioner of Internal Revenue did on the 22nd day of October, 1940, file with the Clerk of the United States Board of Tax Appeals at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of the Board heretofore rendered in the above-entitled cause. A copy of the petition for review and the

assignments of error as filed is hereto attached and served upon you.

Dated this 22nd day of October, 1940.

(Signed) J. P. WENCHEL,
RLW,
Chief Counsel, Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 28 day of October, 1940.

(Signed) ADOLPH B. SPRECKELS,
Respondent on Review.

[Endorsed]: U. S. B. T. A. Filed Oct. 31, 1940.

[33]

In the United States Circuit Court of Appeals for the Ninth Circuit

[Title of Cause.]

NOTICE OF FILING PETITION FOR REVIEW

To: Walter Slack, Esq.,
825 Balfour Building,
San Francisco, California.

You are hereby notified that the Commissioner of Internal Revenue did on the 22nd day of October, 1940, file with the Clerk of the United States Board of Tax Appeals at Washington, D. C., a petition for review by the United States Circuit Court of Ap-

peals for the Ninth Circuit, of the decision of the Board heretofore rendered in the above-entitled cause. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 22nd day of October, 1940.

(Signed) J. P. WENCHEL,
RLW,
Chief Counsel, Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 24 day of October, 1940.

(Signed) WALTER SLACK,
Counsel for Respondent on Review.

[Endorsed]: U. S. B. T. A. Filed Oct. 31, 1940.

[34]

In the United States Circuit Court of Appeals
for the Ninth Circuit

[Title of Cause.]

STATEMENTS OF POINTS

Comes Now the petitioner on review herein and makes this concise Statement of Points on which he intends to rely on the review herein, to-wit:

The United States Board of Tax Appeals erred:

1. In holding and deciding that there is an overpayment in income tax for the year 1935 in the amount of $1,490.10, which amount was paid within

three years before the filing of the amended petition (section 809(a), Revenue Act of 1938).

2. In failing to sustain the deficiency in income tax determined by the Commissioner for the year 1935 in the amount of $4,675.17 less the proper reduction of said amount to reflect the adjustments agreed upon by the parties at the hearing before the Board of Tax Appeals.

3. In holding that commissions of $2,246.25 paid by taxpayer to brokers in 1935 upon the sale of stocks, bonds and commodities are allowable deductions as ordinary and necessary business expenses.

4. In failing to hold that commissions of $2,246.25 paid by taxpayer to brokers in 1935 upon the sale of stocks, bonds and commodities are not allowable deductions as ordinary and necessary business expenses but are [35] an offset against the selling price in computing gain or loss.

5. In that its opinion and decision are not supported by its findings of fact and are contrary to law.

J. P. WENCHEL, W
Chief Counsel, Bureau of Internal Revenue.

Service of a copy of the above statement of points is hereby acknowledged this 6th day of November, 1940.

(Signed) WALTER SLACK,
Attorney for Respondent on Review.

[Endorsed]: U. S. B. T. A. Filed Nov. 13, 1940.

[36]

In the United States Circuit Court of Appeals
for the Ninth Circuit

[Title of Cause.]

DESIGNATION OF PORTIONS OF THE RECORD TO BE PRINTED

Comes Now the petitioner on review herein, and complying with the rules of this Court, pertaining to the designation of the portions of the record to be printed, states that he relies upon the entire record certified by the Clerk of the Board of Tax Appeals to this Court, and directs that said record so certified be printed as the record on review.

Respectfully submitted,

J. P. WENCHEL, W
Chief Counsel, Bureau of Internal Revenue.

Consented to:

(Signed) WALTER SLACK,
Attorney for Respondent on Review.

[Endorsed]: U. S. B. T. A. Filed Nov. 13, 1940.

[37]

In the United States Circuit Court of Appeals
for the Ninth Circuit

[Title of Cause.]

DESIGNATION OF PORTIONS OF RECORD, PROCEEDINGS, AND EVIDENCE TO BE CONTAINED IN RECORD ON REVIEW

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause, in connection with the petition for review by the said Circuit Court of Appeals for the Ninth Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries.
2. Pleadings:
   - (a) Petition,
   - (b) Answer to petition,
   - (c) Amendment to petition,
   - (d) Answer to amendment to petition.
3. Board's findings of fact, opinion and decision.
4. Petition for review.
5. Notices of filing petition for review.
6. Statement of points.
7. Designation of portions of the record to be printed. [38]

8. This designation.

J. P. WENCHEL, W
Chief Counsel, Bureau of Internal Revenue.

Service of a copy of the within designation of portions of record, proceedings, and evidence to be contained in the record on review is hereby admitted and the portions so designated agreed to this 6th day of November, 1940.

(Signed) WALTER SLACK,
Attorney for Respondent on Review.

[Endorsed]: U. S. B. T. A. Filed Nov. 13, 1940.

[39]

[Title of Board and Cause.]

CERTIFICATE

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 39, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 20th day of Nov., 1940.

(Seal) B. D. GAMBLE,
Clerk, United States Board of Tax Appeals.

[Endorsed]: No. 9687. United States Circuit Court of Appeals for the Ninth Circuit. Commissioner of Internal Revenue, Petitioner, vs. Adolph B. Spreckels, Respondent. Transcript of the Record upon Petition to Review a Decision of the United States Board of Tax Appeals.

Filed November 25, 1940.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 9687

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

ADOLPH B. SPRECKELS,
Respondent.

Upon Petitions to Review Decisions of the
United States Board of Tax Appeals

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

[Clerk's Note: This case was submitted to the Court with companion cause, No. 9682, Spreckels vs. Commissioner, and the Circuit Court of Appeals rendered one appeal covering both causes. The consolidated proceedings are set forth in the printed record in said companion cause.]

United States Circuit Court of Appeals
for the Ninth Circuit

No. 9687

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

ADOLPH B. SPRECKELS,
Respondent.

JUDGMENT

Upon Petition to Review a Decision of the United States Board of Tax Appeals.

This Cause came on to be heard on the Transcript of the Record from the United States Board of Tax Appeals and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the Decision of the said Board of Tax Appeals in this Cause be, and hereby is reversed.

[Endorsed]: Filed and entered May 15, 1941. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul, P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing forty-five (45) pages, numbered from and including 1 to and including 45, together with proceedings had in said Circuit Court of Appeals printed in transcript of record in companion cause No. 9682, Adolph B. Spreckels vs. Commissioner of Internal Revenue at pages 51 to 68, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the petitioner, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 20th day of August, 1941.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 20, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(8665)